SEP 19 2000

No. 99-1379

IN THE
SUPREME COURT OF THE UNITED STATES

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

THOMAS W. OSBORNE*
LAURIE A. MCCANN
SALLY P. DUNAWAY
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. PRE-DISPUTE AGREEMENTS TO ARBITRATE ARE NOT VOLUNTARY 6

II. MANDATORY ARBITRATION IS INCOMPATIBLE WITH THE FULL ENFORCEMENT OF THE EMPLOYMENT DISCRIMINATION LAWS 12

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 10

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974), ... 16

Arce [*v. Cotton Club of Greenville, Inc.*,
883 F.Supp. 117 (N.D. Miss. 1995)] 4

Barrentine v. Arkansas-Best Freight System, Inc.,
450 U.S. 728 (1981) 12

Brown v. ITT Consumer Financial Corp.,
211 F.3d 1217 (11th Cir. 2000) 14

Craft v. Campbell Soup Co.,
161 F.3d 1199 (9th Cir. 1998) 5

EEOC v. Commercial Office Products Co.,
486 U.S. 107 (1988) 10

Floss v. Ryan's Family Steak Houses, Inc.,
211 F.3d 306 (6th Cir. 2000) 14

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) . . . . . *passim*

Graham Oil v. ARCO Products Co.,
43 F.3d 1244 (9th Cir. 1994) 14

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 10

Haskins v. Prudential Insurance Co., of America
2000 WL 1209274 (6th Cir. Aug. 28, 2000) 14

Hooters of America v. Phillips,
173 F.3d 933 (4th Cir. 1999) 14

Koveleskie v. SBC Capital Markets, Inc.,
167 F.3d 361 (7th Cir. 1999) 4

McKennon v. Nashville Banner Public Co.,
513 U.S. 352 (1995) 13

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 6

Oubre v. Entergy Operations, Inc.,
118 S. Ct. 838 (1998) 8

Paladino v. Avnet Computer,
134 F.3d 1054 (11th Cir. 1998) 14

Perry v. Thomas,
482 U.S. 483 (1987) 8

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477, 481 (1989) 12

Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
170 F.3d 1 (1st Cir. 1999) 14

Sutton v. United Air Lines, Inc.,
119 S. Ct. 2139 (1999) 10

Textile Workers Union v. Lincoln Mills of Alabama,
353 U.S. 448 (1957) 4

Tony & Susan Alamo Foundation v. Secretary of Labor,
471 U.S. 290 (1985) 7

United Steelworkers of America v. Warrior
and Gulf Navigation Co., 363 U.S. 574 (1960) 13

U.S. Bulk Carriers v. Arguelles,
400 U.S. 351 (1971) 16

Wright v. Universal Maritime Service Corp.,
119 S. Ct. 391 (1998) 3

FEDERAL STATUTES

Age Discrimination Employment Act (ADEA),
29 U.S.C. § 621 *et seq* 2, 3, 8
29 U.S.C. § 626(f)(1)(A-H) 6

Civil Rights Act of 1991 (CRA),
42 U.S.C. §1981a(c) 9, 10

Fair Labor Standards Act (FLSA),
29 U.S.C. § 201 *et seq*. 7

Federal Arbitration Act (FAA),
9 U.S.C. § 1 . . . . . 2, 3, 4, 5, 6

National Labor Relations Act (NLRA),
29 U.S.C. § 151 6

Norris-La Guardia Act,
29 U.S.C. § 102 6

Older Workers Benefit Protection Act of 1990 (OWBPA),
29 U.S.C. § 626(f)(1)(A-H) 6

STATE STATUTES

Cal. Lab. Code § 923 7

MISCELLANEOUS

Marc Bendick et al., *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, Journal of Aging & Social Policy, Vol. 10(4) 1999, at 20, (citation omitted) . . . 2

Paul D. Carrington, *The Dark Side of Contract Law*, Trial, May 2000, at 73, 74 8

Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 Hofstra Lab. & Employment L.J. 345, 365 (Spring 1998) 4

EEOC, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 133 Daily Lab. Rep. (BNA) E-4, July 11, 1997) 10, 11, 13, 14, 15

Money, July 1996 8

National Academy of Arbitrators (NAA) Statement of Guidelines, (May 21, 1997) 103 Daily Lab. Rep. (BNA) E-1 9

Presidential Commission on the Future of Worker-Management Relations: Report and Recommendations, pp. 28-29, (December 1994) 15

Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. (1923) 5

SEC Rel. No. 34-40109, 63 Fed. Reg. 35299, 1998 WL 339422 4

SEC Rel. No. 34-40858, 64 Fed. Reg. 1051, 1999 WL 3315 4

S. Rep. 101-79, 101st Cong., 1st Sess. (1989) 6, 7, 9

Time Select Careers: Unmasking Age Bias, Time, Sept. 7, 1998 8

137 Cong. Rec. H9526 (Daily ed. Nov. 7, 1991) (statement of Rep. Edwards) 10

No. 99-1379

IN THE

SUPREME COURT OF THE UNITED STATES

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

AARP is a nonprofit membership organization of more than thirty-four million people age 50 or older that is dedicated to addressing the needs and interests of Americans over the age of 50. One of AARP's primary objectives is to achieve dignity and equality in the work place through

---

[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, encourage employers to hire and to retain older workers, and help workers overcome the obstacles they encounter because of age. AARP supports the rights of older workers and the public policies designed to protect their rights and to preserve the legal means to enforce them.

More than forty percent of AARP's members, most of whom are protected by the Age Discrimination in Employment Act (ADEA) and other federal and state laws prohibiting employment discrimination, remain active in the work force. The proper interpretation and application of these statutes are of paramount importance to the millions[2/] of older workers who rely on them to remedy invidious bias in the work place. Mandatory, pre-dispute arbitration provisions in employment contracts, such as the one at issue in this case, threaten the protection afforded workers under the ADEA and other federal civil rights laws and undermine the enforcement system Congress designed to eliminate employment discrimination in society. Workers should not be forced to decide between their jobs and enforcement of their statutory rights, the stark choice presented by mandatory arbitration agreements. If arbitration is to occur it should be post-dispute and voluntary. In this way employees will have a true choice of forum for resolving employment discrimination claims that is consistent with both the letter and the spirit of the nation's antidiscrimination laws. For these reasons, AARP files this brief *amicus curiae* urging the Court to affirm the decision of the court below holding that the Federal Arbitration Act (FAA) does not apply to employment disputes.

2/ "As of 1995, approximately 41 million members of the nation's civilian workforce were age 45 or older." Marc Bendick, et al., *No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers*, Journal of Aging & Social Policy, Vol. 10(4) 1999, at 20, (citation omitted).

SUMMARY OF ARGUMENT

The legislative history of the FAA could not be clearer: The FAA was not intended to apply to arbitration clauses in employment contracts. The reason for this exclusion is that the equality of bargaining power presumed to exist between the parties to the commercial contracts to which the FAA was intended to apply is totally lacking in the employer-employee relationship outside of the collective bargaining arena. The inequality of bargaining power between employer and employee vitiates any voluntariness on the part of the employee who, as a practical matter, is forced to arbitrate statutory claims under the civil rights laws or forfeit the job. The "take it or leave it" nature of such agreements denies employees a forum in which they will be able to fully vindicate their statutory rights.

ARGUMENT

The first section of the FAA states:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. §1. Although *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), upheld a provision that required arbitration of a claim under the ADEA, the court made it clear that it was not addressing the question presented here, *i.e.*, the applicability of the FAA to employment contracts containing such provisions. The *Gilmer* court refused to consider the question because the arbitration provision at issue was not in a contract of employment, but in Gilmer's securities registration application. *Id.* at 25 n. 2; *see Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391, 397 n.

2 (1998).[3] In his dissent in *Gilmer*, Justice Stevens concluded that the language of section 1 of the FAA meant that "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA ...." 500 U.S. at 36 (Stevens, J., dissenting).[4] Justice Frankfurter reached a similar conclusion: "[w]hen Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 466 (1957) (Frankfurter, J., dissenting).

The legislative history expressly supports this construction. At the Senate Judiciary Subcommittee hearings on the bill which eventually became the FAA, the chair of the American Bar Association committee responsible for drafting the bill stated that it was not intended to "be an act referring to labor disputes at all. It is purely an act to give the

---

[3] 500 U.S. at 25 n.2 As pointed out in *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), the Securities and Exchange Commission (SEC) approved changes to both the National Association of Securities Dealers (NASD) and the New York Stock Exchange (NYSE) arbitration rules considered in *Gilmer*. Under the amendments, statutory employment-related discrimination claims are arbitrable only if the parties agree to arbitration *after* the dispute has arisen; absent such agreement, however, arbitration of such claims is not compulsory. The NASD rule change went into effect on January 1, 1999. *See* SEC Rel. No. 34-40109, 63 Fed.Reg. 35299, 1998 WL 339422. The NYSE rule change was approved by the SEC on December 29, 1998. *See* SEC Rel. No. 34-40858, 64 Fed.Reg. 1051, 1999 WL 3315.

[4] *See* Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 Hofstra Lab. & Employment L.J. 345, 365 (Spring 1998) ("On the whole, Justice Stevens ... and federal district courts like the court in *Arce* [*v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117 (N.D. Miss. 1995)], would seem to have the better argument: that the Federal Arbitration Act was not meant to cover contracts of employment.")

merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) (hereinafter "Senate Hearing"), at 9, quoted in *Gilmer*, 500 U.S. at 539 (Stevens, J., dissenting).

At that same hearing, Senator Walsh stated:

> The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Senate Hearing, at 9.

After analyzing Congress' intent in enacting the FAA by examining the "historical context" of the phrase "engaged in ... interstate commerce," the Ninth Circuit concluded that section 1 of the FAA "was clearly intended to exempt *all* employment contracts over which Congress had interstate commerce power." *Craft v. Campbell Soup Co.*, 161 F.3d 1199, 1202-03 (9th Cir. 1998). While the other circuits have concluded for other reasons that the FAA does apply to employment disputes, it is clear that at the time of the enactment of the FAA, no one envisioned the use of dispute

resolution clauses mandating arbitration to strip essentially powerless workers of rights that were enacted for their protection.

Moreover, the Court's conclusion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum," presupposes both the *voluntary* agreement of the party to arbitrate claims and the ability to fully vindicate statutory rights in this forum. Where "agreements" to arbitrate are conditions of employment, it is clear that neither condition is satisfied.

I. PRE-DISPUTE AGREEMENTS TO ARBITRATE ARE NOT VOLUNTARY.

This nation's entire body of labor law has been created in response to the inequality of bargaining power between employers and individual employees. For example, in the National Labor Relations Act, at 29 U.S.C. §151 (NLRA), Congress proclaimed that the purpose of the statute is to "restor[e] equality of bargaining power between employers and employees." In the Norris-La Guardia Act, at 29 U.S.C. §102, Congress declared that because "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment," it is the public policy of the United States that "he shall be free from the interference, restraint, or coercion of, employers of labor." In its deliberations regarding the adoption of the protections relating to workers' waivers of rights and claims which were eventually enacted in the Older Workers Benefit Protection Act of 1990 (OWBPA), codified at 29 U.S.C. § 626(f)(1)(A-H), "[c]ongress recognized the significant inequalities in bargaining power that exist between employers and employees ...." S. Rep. 101-79, 101st Cong., 1st Sess. 4 (1989). In the OWBPA context, as in the NLRA, Norris - LaGuardia Act, and FAA, Congress was concerned about the employer's coercion of the individual worker. "The

Committee's major concern in this regard is that early retirees or employees being offered the chance to participate in exit incentive or other group termination programs can effectively be forced to waive their right to file a claim when the employer conditions such participation on the signing of a waiver." *Id.* at 9.

California, where this case arose, has similarly acknowledged the inability of individual employees to bargain on an equal basis with employers:

> [T]he public policy of this State is declared as follows: Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, *the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby obtain acceptable terms and conditions of employment* ....

Cal. Lab. Code § 923 (emphasis added).

The Court has similarly acknowledged the inherent inequality between employees and employers as a fundamental underpinning of the employment statutes. Finding that a waiver of rights under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA), was contrary to public policy, the Court concluded that "employers might be able to use superior bargaining power to coerce employees to ... waive their protections under the Act." *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985). Justice O'Connor shared this concern in the case of a state statute intended to protect employees "from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system

for redress of an employment grievance." *Perry v. Thomas*, 482 U.S. 483, 495 (1987) (O'Connor, J., dissenting). In *Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 844 (1998), the Court acknowledged that the OWBPA "reflects concern about the conditions (of knowledge and free choice) surrounding the making of a contract to waive an age discrimination claim."

Given this legislatively and judicially recognized lack of bargaining power on the part of individual employees like Respondent Adams, and the concomitant opportunity for coercion on the part of the employer, it cannot be seriously maintained that the employee's "agreement" to a predispute arbitration clause is voluntary in the sense of the free assent required for a valid waiver of statutory rights.

In the employment context, it is, indeed, a "false assumption" that if the worker rejects the proffered arbitration clause, "another employer would offer a worker a job where his or her statutory rights would be enforceable . . . ." Paul D. Carrington, *The Dark Side of Contract Law*, Trial, May 2000, at 73, 74. This false assumption operates with particular force in the case of an older worker[5/] who has lost a job and who has finally obtained an interview for another job after searching much longer than his younger counter parts.[6/] Given the older applicant's lower probability of successfully obtaining a job comparable to his former

---

[5/] A person age forty or older protected by the ADEA, 29 U.S.C. § 621 *et seq*.

[6/] *Time* Magazine reported that most older workers who are replaced by younger people willing to work for less money "eventually find some kind of new employment. Trouble is, they have to search long and hard, and then they must often settle for low-paid, low-skilled work." "Time Select Careers: Unmasking Age Bias," at 3, *Time*, Sept. 7, 1998. One study found that in Philadelphia in 1994 it took people 50 and older an average of 25 weeks to find a new job, compared to 18 weeks for people under 40. *Money*, July 1996, at 121.

position,[7/] it is completely unrealistic to expect that he would turn down a job because the employer conditioned it on his accepting mandatory arbitration of all statutory claims that might arise. To the contrary, when confronted with the employer's proclamation of arbitration as a condition of employment, the only realistic choice for the older employee or applicant is to accept the arbitration clause or lose the job.

The National Academy of Arbitrators, the nation's leading professional organization of labor-management arbitrators, while strongly supporting arbitration in the collective bargaining context, has condemned the concept of mandatory pre-dispute arbitration agreements for individual workers.

In 1997, the Academy passed a resolution stating: "The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for pursuit of statutory rights." National Academy of Arbitrators (NAA) Statement of Guidelines (May 21, 1997) 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997). According to the president of the NAA, the business of arbitrators is fairness "and the absence of fairness, wherever it occurs, should be our concern." *Id*. In connection with the issuance of the Guidelines, the former president of the NAA pointed out that arbitrators are accustomed to a system involving parties of equal power and that mandating arbitration as a condition of employment is "not as fair" as traditional, [*i.e.*, truly voluntary post dispute] arbitration. *Id*.

In 1991, after the *Gilmer* decision, Congress passed the Civil Rights Act of 1991 (CRA), which, *inter alia*, expressly gave employees the right to a jury trial in discrimination claims brought under Title VII. 42 U.S.C. §1981a(c).

[7/] In discussing the "unfair and abusive waiver practices" that led to the adoption of the OWBPA, Congress found that "once out of work, these older Americans have less than a 50/50 chance of ever finding new employment." S. Rep. 101-79, 101st Cong., 1st Sess. 4 (1989).

Although the CRA encouraged the use of all forms of alternate dispute resolution, as explained by Representative Edwards, "The section contemplates the use of *voluntary* arbitration to resolve specific disputes *after they have arisen*, not coercive attempts to force employees in advance to forego statutory rights." 137 Cong. Rec. H9526 (Daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (emphasis added).

The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the nation's employment laws, has issued an extensive policy statement condemning mandatory arbitration of civil rights claims. At the same time, the EEOC reaffirmed its support for *voluntary* arbitration and other alternative approaches to resolve employment discrimination disputes. EEOC, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 133 Daily Lab. Rep (BNA) E-4, July 11, 1997) [hereinafter EEOC Policy Statement]. This Court traditionally gives "great deference" to the EEOC's interpretation of the civil rights laws enforcing employee rights. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).[8/]

In the EEOC Policy Statement, the agency stated that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced" in the "nation's employment discrimination laws." 133 Daily Lab. Rep. (BNA) E-4, July 11, 1997.

[8/] *Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139 (1999), does not affect the deferential consideration traditionally afforded EEOC policies, since in that case the Court found no need to address the question of what deference is due such agency determinations. *Id.*, at 2145.

The Commission further found that:

> The imposition of mandatory arbitration agreements as a condition of employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws. The private arbitral system differs in critical ways from the public judicial forum and, *when imposed as a condition of employment, it is structurally biased against applicants and employees*.

Id. at E-7 (emphasis added). Further, "[t]he terms of the private agreement defining the arbitrator's authority and the arbitral process are characteristically set by the more powerful party, the very party that the public law seeks to regulate." *Id.* Such "agreements are imposed by employers because they believe them to be in their interest, and they are made possible by the employer's superior bargaining power." *Id.*

The EEOC Policy Statement concluded:

> The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. *Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws*.

Id. at E-9 (emphasis added).

Chief Justice Burger reached the same conclusion sixteen years before the EEOC Policy Statement:

> Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

Barrrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

In summary, it is quite clear that the drafters of the FAA and the Congress that enacted it did not intend for it to apply to employment disputes. The reason for excepting employment disputes from the coverage of the FAA, the unequal bargaining power of employers and employees with its potential for coercion and abuse of the weaker party by the stronger, is at least as valid today as it was at the time of the FAA's enactment. Allowing employers who seek to exploit their power over the work place unilaterally to impose mandatory arbitration in all employment disputes is not only bad law, but bad public policy as well.

II. MANDATORY ARBITRATION IS INCOMPATIBLE WITH THE FULL ENFORCEMENT OF THE EMPLOYMENT DISCRIMINATION LAWS.

In *Gilmer*, this Court decried "generalized attacks on arbitration" that "'res[t] on suspicion of arbitration as a method of weakening the protections afforded in substantive law to would-be complainants.'" 500 U.S. at 30, quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989). This criticism has been squarely answered by the EEOC Policy Statement, which unequivocally concludes: "Mandatory arbitration of

employment discrimination disputes 'privatizes' enforcement of the federal employment discrimination laws, thus undermining public enforcement of the laws." 133 Daily Lab. Rep. (BNA) July 11, 1997, at E-7. The EEOC determined that "[e]ven the fairest of arbitral mechanisms will differ significantly from the judicial forum." *Id.*

In *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352,358-59 (1995), the Court emphasized the importance of public accountability to the enforcement of the civil rights laws:

> The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the ADEA's operation or entrenched resistance to its commands, either of which can be of industry-wide significance.

In stark contrast, in mandatory arbitration there is little public accountability because the "public plays no role in an arbitrator's selection; s/he is hired by the parties" and "the arbitrator's authority is defined and conferred, not by public law, but by private agreement." *Id.* Indeed, an arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties." *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

The EEOC determined that arbitration does not allow for development of the law because there may be no requirement for a written decision, the decisions are not made public without the consent of the parties, and judicial review

of arbitral decisions is severely limited, leaving "higher courts and Congress unable to act to correct errors in statutory interpretation. *The risks for the vigorous enforcement of the civil rights laws is profound.*" 133 Daily Lab. Rep. at E-7, July 11, 1997 (emphasis added).

The EEOC also described other aspects of arbitration that limit claimants' rights in important respects, including the unavailability of a jury trial, significantly limited discovery, and the unsuitability of arbitration for resolving class or pattern or practice discrimination claims.[9/] *Id.* Mandatory arbitration "may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader - and more accurate - view of the employer's conduct." *Id.* In addition, unlike a judicial proceeding, "results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator." *Id.* Finally, "unlike voluntary post-dispute arbitration - which must be fair enough

---

[9/] Mandatory arbitration agreements in recent years have included, for example, the following elements: (1) the reservation of the right to change the rules without any obligation to notify, much less receive consent from the employee, (*Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000)); (2) failure to state that statutory claims were included in the agreement to arbitrate, (*Brown v. ITT Consumer Financial Corp.*, 211 F. 3d 1217 (11th Cir. 2000)); *Haskins v. Prudential Insurance Co. of America*, 2000 WL 1209274 (6th Cir. Aug. 28, 2000), (3) a limitation on the damages an employee may recover, *i.e.*, no tort damages, or no punitive damages (*Paladino v. Avnet Computer*, 134 F.3d 1054 (11th Cir. 1998)); *Hooters of America v. Phillips*, 173 F.3d 933 (4th Cir. 1999), (4) limitations on the discovery available prior to the arbitration, which inevitably works to the disadvantage of the plaintiff (*Id.*); (5) controlling the panel of arbitrators (*Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999)); (6) shortening the statute of limitations (*Graham Oil v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994)); and (7) forbidding the arbitrator from awarding attorneys fees or costs, regardless of whether statutes provide such remedies to prevailing plaintiffs (*Paladino, Hooters of America, Graham Oil*).

to be attractive to the employee - the employer imposing mandatory arbitration is free to manipulate the arbitral mechanism to its benefit." *Id.*

The EEOC Policy Statement pointed out that the agency's conclusions were consistent with the analysis of the Presidential Commission on the Future of Worker-Management Relations, otherwise known as the Dunlop Commission. *Id.* In its December 1994 "Report and Recommendations," the Dunlop Commission expressed concern about

> the potential for abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment.

Presidential Commission on the Future of Worker-Management Relations: Report and Recommendations, pp. 28-29, (December 1994). Given this concern, the Dunlop Commission formally recommended that "binding arbitration agreements should not be enforceable as a condition of employment." *Id.* at 34-35.

Based in part on concerns similar to those expressed by the EEOC and the Dunlop Commission, both the National Association of Securities Dealers and the New York Stock Exchange have amended their rules to except statutory employment discrimination claims from mandatory arbitration. *See* note 3 *infra*. Pursuant to the rule changes, such claims are arbitrable only if the parties agree to arbitration *after* a dispute has arisen.[10/]

[10/] *See* note 3 *infra*.

This Court has also concluded that

> [t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. Furthermore, we have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'

Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974), quoting *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351, 359-60 (1971) (Harlan, J., concurring). Additionally, "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII" because "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Id.* at 56-57.

CONCLUSION

The legislative history of the FAA strongly supports the conclusion that Congress intended to exempt employment disputes from mandatory arbitration. While post-dispute agreements to arbitrate may be truly voluntary, the "consent" of individual workers to so-called "voluntary" pre-dispute agreements to arbitrate statutory claims is vitiated by the coercive nature of the employer-employee relationship, which is characterized by the unequal bargaining power of the parties. The arbitral process, by its nature, is generally not a forum in which employees are able to fully vindicate their statutory rights. Due to the widely recognized inadequacies of mandatory arbitration for the adjudication of statutory employment discrimination claims, the process has been abandoned by the very industry in which it was approved by this Court in *Gilmer*. For these reasons, *amicus curiae* AARP urges the Court to confirm the congressional intent underlying the FAA by holding that it does not compel arbitration of employment disputes.

September 19, 2000

Respectfully submitted,

Thomas W. Osborne*
Sally P. Dunaway
Laurie A. McCann
AARP Foundation Litigation

Melvin Radowitz
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
AARP

*Counsel of Record